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In The
Supreme Court of the United States

DAIMLERCHRYSLER CORP., et al.,

Petitioners,

v.

CHARLOTTE CUNO, et al.,

Respondents.

and

WILLIAM W. WILKINS,
Tax Commissioner etc., et al.,

Petitioners,

v.

CHARLOTTE CUNO, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE WAYNE COUNTY, MICHIGAN, IN SUPPORT OF PETITIONERS

EDWARD M. THOMAS
Wayne County
Corporation Counsel
*MELVIN BUTCH HOLLOWELL
ALLEN BROTHERS, PLLC
Attorneys for Wayne County
400 Monroe St., Ste. 220
Detroit, MI 48226
(313) 962-7777
Attorneys for Petitioners
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICUS CURIAE[1]

Wayne County is the largest county in Michigan, with a population of over two million. It was once headquarters to all of "The Big Three." Petitioner DaimlerChrysler is headquartered in an adjacent county. Wayne County is still headquarters to Ford Motor Co. and General Motors Corp. Many of the Big Three manufacturing facilities, along with the facilities of Petitioner DaimlerChrysler Corp., are located in Wayne County, in part, because of tax incentives enacted by both the Michigan legislature and Wayne County government.

Wayne County, has the power to levy property taxes and the power to enact tax incentives like the incentives being challenged in this case. (Wayne County Charter, § 5.181). Not surprisingly, given Wayne County's prominence in the world's automotive and manufacturing history, it is the policy of Wayne County to capture and encourage industrial and economic growth.

Wayne County has a vital interest in assuring that disgruntled citizens, such as Respondents, not be allowed to use the courts to overrule the legislative and policy decisions of duly elected lawmakers. If the decision of the Sixth Circuit is allowed to stand in this case, persons from inside and outside the jurisdiction – regardless of injury or motive – will have the imprimatur of this Court to attack the self-governance principles inherent in a republican form of government. The separation of powers requires

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[1] Under Supreme Court Rule 37.6, amicus curiae state that no counsel for a party has written this brief in whole or in part, and no entity or person, other than the amicus curiae, has made a contribution to the preparation or submission of this brief.

that Respondents – and, indeed, all citizens – effect policy decisions through their elected officials, and not through the Court.[3]

STATEMENT OF THE CASE

In 1998, Toledo, Ohio – which is only 20 miles from the southern border of Wayne County – and two local school districts provided a $281 million tax incentive to DaimlerChrylser to encourage it to continue its manufacturing presence in those communities. The Ohio statutory scheme permitting the investment tax credit was enacted "to encourage industrial investment and development in Ohio, particularly in economically troubled areas." *Cuno v. DaimlerChrysler, Inc.*, 154 F. Supp. 1196, 1198, 1201 (2001). The Ohio economy like Michigan's is heavily reliant on the manufacturing and automobile industries, and has suffered through an exodus of jobs.

Respondents, plaintiffs below, filed a law suit challenging the constitutionality of the incentives under the Commerce Clause and the Equal Protection Clause of the United States Constitution. Respondents are individual residents of Ohio, individual residents of Michigan, two Ohio small businesses, and one not-for-profit Ohio corporation. Respondents do not allege any specific injury as a result of the Ohio investment tax credit statute but, rather, seek to "free all the states from the necessity of engaging in escalating competition over incentives that deprives all of them of needed revenues, while gaining a

[3] *See DeShaney v. Winnebago Co. Dep't of Social Services*, 489 U.S. 189, 203 (1989).

meaningful competitive edge for none." (Op. Cert. at 6). Respondents further argue that investment tax credits are bad public policy (Op. Cert. at 6).

The United States District Court for the Northern District of Ohio found that the challenged statute's purpose "constitutes a legitimate state interest that clearly has a rational nexus" to the tax credit. *Id.* at 1201. The court found that "[n]otwithstanding Plaintiffs' innovative arguments" Ohio's investment tax credit does not violate the Commerce Clause. *Id.*

A panel of the United States Court of Appeals for the Sixth Circuit held that the investment tax credit statute (Ohio Rev. Code Ann. § 5733.33) is unconstitutional under the Dormant Commerce Clause of the United States Constitution because "the tax credit involves state regulation of interstate commerce through its power to tax" even though the investment tax credit "is equally available to in-state and out-of-state businesses." *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 743, 746 (6th Cir. 2004). The court did not address standing.

This Court granted certiorari and directed the parties to brief the following question: whether Respondents have standing to challenge Ohio's investment tax credit, Ohio Rev. Code Ann. § 5733.33. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 36 (2005).

SUMMARY OF ARGUMENT

I

This Court does not sit as a "super-legislature" to second-guess the desirability of statutes. The states may,

"within extremely broad limits," experiment with different economic philosophies. Thus, even if this Court were to find Ohio's tax statutes unwise or ineffective, this Court is still obligated by the Constitution to tolerate what it may regard as a legislative mistake. Founded in 1796, before Michigan was admitted to the Union, amicus Wayne County's experience is that tax incentives are both effective and necessary. Wayne County maintains that it is good government to utilize tax resources for economic viability.

II

Respondents lack standing to challenge the constitutionality of Ohio's tax incentive statutes because Respondents have not suffered an "injury in fact" as a result of those statutes nor is it likely that their alleged grievances would be redressed by a favorable decision of this Court.

III

The Sixth Circuit has misapplied longstanding precedent in the area of interstate commerce, as the tax incentives provided by Ohio, and by jurisdictions like Wayne County do not constitute an undue burden on interstate commerce, in violation of the Dormant Commerce Clause.

ARGUMENT

I

THIS COURT DOES NOT SIT AS A SUPER-LEGISLATURE DECIDING STATE POLICY, THUS, RESPONDENTS CANNOT INVOKE THIS COURT'S JURISDICTION TO IMPOSE POLICY ON THE STATES

The question before this Court is not whether the Ohio tax incentive statute is wise or unwise, desirable or undesirable. *James v. Strange*, 407 U.S. 128, 133 (1972). *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 339 (1969). The question before this Court is not what economic philosophy Ohio should or should not embrace. *Id.* The question before this Court is not whether Ohio's statute is effective or ineffective. The sole question before this Court is whether the statute is constitutional. *James*, 407 U.S. at 133.

This Court has repeatedly held that it does not sit as "a super-legislative body." *Sniadach*, 395 U.S. at 339. *Day-Brite Lighting v. State of Missouri*, 342 U.S. 421, 423 (1952). But, rather, "state legislatures have constitutional authority to experiment with new techniques . . . [and] they may within extremely broad limits control practices within the business-labor field so long as specific constitutional prohibitions are not violated." *Id.* Indeed, this Court need not concur in those legislative policies to hold the enactments constitutional. *Harisiades v. Shaughnessy*, 342 U.S. 580, 590 (1952). Judicially this Court is obligated by the Constitution to tolerate what it may regard as a legislative mistake. *Id.* Misguided laws may nonetheless be constitutional. *James*, 407 U.S. at 133.

Thus, it is Respondents' considerable burden to prove, not that tax incentive statutes are unwise, but that they are unconstitutional. *Id.*

A. Tax Incentives Are Vital to Wayne County's Economy

Wayne County is the largest county in the State of Michigan and the eleventh largest in the nation. It is comprised of 44 cities, including Detroit. It is historically, and culturally fused with the automobile industry and heavy manufacturing. There have been thoughtful efforts to diversify the economy by working to attract and develop business growth in high technology, service, tourism, entertainment, and health care industries. But Wayne County is the home of the automobile. Wayne County's citizens work in its factories, and Wayne County's economy rises and falls with the number of cars purchased by consumers.

For 30 years Wayne County's economy has been in serious decline. Its unemployment rate of six percent is the highest in the nation. A recent study conducted by the Initiative for a Competitive Inner City, indicates that Wayne County's largest city, Detroit, lost more jobs between 1995 and 2003 than any other large American city. Detroit has 400,000 fewer jobs today than it had in 1970.

As a result of these economic challenges, Wayne County and other similarly situated municipalities have needed to employ a strategy to assist the businesses that are already located in Wayne County and to attract new ones. One of those strategies is providing tax incentives to those businesses in return for job creation.

Michigan Public Act 198 of 1974 allows a 50 percent reduction in local property taxes to businesses for the renovation expansion, or new construction of manufacturing plants in Michigan. Wayne County is eligible to grant abatements under this statute, and has done so with success. Overall, this program has resulted in the creation of 500,000 new jobs and the creation of 1.3 million jobs throughout Michigan.

Michigan Public Act 328 of 1998 is targeted at "distressed" communities, abating all (100%) new personal property taxes in designated geographic areas. Wayne County has taken advantage of this for businesses within its boundaries.

Michigan Public Act 146 of 2000, known as the obsolete Property Rehabilitation Act, encourages the redevelopment of obsolete buildings by freezing taxes on the property for up to 12 years.

Tax Increment Finance Authority Districts have been established in Wayne County to capture and re-invest taxes for the development of projects such as Ford Field, home of the Detroit Lions, and the Detroit Tigers' Stadium known as Comerica Park. Both stadiums have created thousands of jobs in the county and metro region.

Other tax incentives have been employed with success by Wayne County, such as the "Brownfield" program which encourages the development of sites that are contraindicated. Up to $1 million in credits are available.

A newer program created by the state, called the Michigan Economic Growth Authority, provides tax incentives for development in the areas of high technology and research and development.

These programs are the life-blood of Wayne County's job retention efforts. Wayne County must be able to utilize these tools to survive in an increasingly tough economic climate.

Many business, which are automotive suppliers or automotive related, would prefer to be physically proximate to the auto companies based in Wayne County. Being close to the customer provides economies of scale for distribution and supply. But these suppliers and automotive related companies, which form the backbone of Wayne County's job base, will locate elsewhere if the overall cost of doing business is lower elsewhere. Taxes are not the only factor, but they are certainly a key factor.

The use of tax incentives to preserve Wayne County's job base is not an abstract economic theory, it is a means to assist County citizens from the crisis of losing a job, and the devastation that flows from it including lost homes, health care, and the ability to buy groceries.

Wayne County is, therefore, committed to utilizing these tax incentives as one effective tool in preserving its economic base and way of life.

There are a number of factors that a company takes into account when deciding whether doing business in a particular locale makes sense. Some of those factors include: the availability of workers; the opportunity to grow; the regulatory environment; competition; access to health care; location; and taxable costs of doing business. There are other important, non-bottom line factors which are considered, such as quality of life issues.

It is Wayne County's economic development experience that the taxable cost of doing business rates high on

the list, and must be addressed if Wayne County is to be competitive with other regions and the world market.

II

RESPONDENTS LACK STANDING TO CHALLENGE OHIO'S TAX CREDIT STATUTE BECAUSE RESPONDENTS' INJURIES ARE CONJECTURAL AND NOT LIKELY TO BE REDRESSED BY A FAVORABLE DECISION

The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. *Kowalski v. Tesmer*, 543 U.S. 125, ___, 125 S. Ct. 564, 567 (2004). The party invoking federal jurisdiction bears the burden of establishing that jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Thus, since Respondents here invoked the jurisdiction of this Court, Respondents bear the burden of establishing that they have standing. *Id.*

A. Respondents Lack Article III Standing

This Court has held that the "irreducible constitutional minimum" of standing contains three elements:

1. "Injury in fact" of a legally protected interest that is, concrete and particularized, actual or imminent, and not conjectural or hypothetical;

2. A causal connection between the injury and the challenged action, an injury which is not the result of the independent action of a third party; and

3. An injury that will likely, not speculatively, be redressed by a favorable decision of the court. U.S. Const art. III, § 1. *Lujan*, 504 U.S. at 560-561.

Here, Respondents cannot establish any of these required elements. Respondents are individual residents of Ohio, individual residents of Michigan, two Ohio small businesses, and one not-for-profit Ohio corporation. Comp. ¶¶ 2-6. The Ohio Respondents allege that, as a result of the tax credit, the revenues of their state have diminished and that the tax credit impermissibly and disproportionately shifts the tax burden to them. Comp. ¶¶ 22, 40, 42.

In a similar case, this Court refused to confer standing on state taxpayers, who alleged that a state statute governing mineral leases "deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes." This Court held that the taxpayers lacked standing because "even if the first part of the assertion were correct . . . it is pure speculation whether the lawsuit would result in any actual tax relief for respondents." *ASARCO v. Kadish*, 490 U.S. 605, 613, 614 (1989).

This Court went on to say, "[t]he possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is 'remote, fluctuating and uncertain' . . . and consequently the claimed injury is not 'likely to be redressed by a favorable decision.'" *Id.*

Like the taxpayers in *ASARCO*, the Ohio taxpayers, in the case before the Court today, lack standing because their lawsuit rests on conjecture and their claimed injury would not likely be redressed by a favorable decision. *Id.* Similarly, the Michigan Respondents' lawsuit rests on even greater speculation: that they lost "economic opportunity in the form of jobs" because of the Ohio tax credit. Comp.

¶ 42. The Michigan Respondents speculate that, had DaimlerChrysler not expanded in Ohio, it would have expanded in Michigan and given Respondents a chance at jobs. That speculation does not even come close to an "injury in fact," caused by the challenged tax credit, which would likely be redressed by a favorable decision.

B. Respondents Lack Standing To Raise The Rights Of Others

An alternative threshold question of standing asks if Respondents have standing to raise the rights of others. *Kowalski*, 125 S. Ct. at 567. A party seeking third-party standing must show: first, that the party asserting the right has a "close" relationship with the person who possesses the right; and, second, that there is a "hindrance" to the possessor's ability to protect his own interest. *Id.* Here, Respondents have alleged no such cause of action or no such relationship.

Further, the right to complain that a state law discriminates in violation of the Commerce Clause belongs to those against whom the law discriminates. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 321 n. 3 (1977). Here, Respondents lack third-party standing because they do not allege that the tax credit discriminates against them. *Id.*

III

THE SIXTH CIRCUIT HAS MISAPPLIED LONGSTANDING PRECEDENT IN THE AREA OF INTERSTATE COMMERCE, AS THE TAX INCENTIVES PROVIDED BY OHIO, AND BY JURISDICTIONS LIKE WAYNE COUNTY DO NOT CONSTITUTE AN UNDUE BURDEN ON INTERSTATE COMMERCE, IN VIOLATION OF THE DORMANT COMMERCE CLAUSE

This Court has held that under the Federal Economic Clause, a state (and by extension a political subdivision thereof such as Wayne County) may enact its own philosophy towards business taxation. *Id.* In *Boston Stock Exchange,* this Court explained that, "Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a state may not compete with other states for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition no state may discriminatorily tax the products manufactured or the business operations performed in any other state." *Id.* at 336-337.

In *H.P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949), Justice Robert Jackson articulated the Court's position on state regulation and the national economy. For the Court, he wrote, "The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action. [Perhaps] even

more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the [Constitution]."

The "great silence" created by the Founding Fathers in the Commerce Clause, has long meant that the states, and municipalities like Wayne County, have great freedom to enact economic programs to benefit businesses within its boundaries, where Congress has not "spoken" in some pre-emptive fashion, so long as the economic program does not affirmatively discriminate against foreign corporations. This great silence has come to be known as the Dormant Commerce Clause theory.

The "Dormant Commerce Clause" theory has been used to strike down undue burdens on interstate commerce. But such a burden was not found in *Boston Stock Exchange* where tax incentives for intrastate benefits was applied.

In the case before the Court today, the Sixth Circuit cited *Boston Stock Exchange* but misapplied it by holding that Ohio's tax incentive was discriminatory.

On the contrary, Ohio, like Wayne County, and like other jurisdictions throughout the country, is constitutionally permitted to provide such tax incentives to businesses within its borders because it has not imposed a tax burden on products or business operations on a company in another state. Taxing discrimination in this sense would require some steps to actively hinder a company or product line in another state, while creating the intrastate advantage, and there is no evidence of that type of undue tax burden on out-of-state businesses in this case.

Significantly, the Sixth Circuit's decision is expressly contrary to the leading state law case in the Sixth Circuit, decided by the Michigan Supreme Court in *Caterpillar, Inc. v. Department of Treasury*, 488 N.W. 2d 182 (Mich. 1992). In the *Caterpillar* case, the Michigan Department of Treasury extended a capital acquisition deduction to Caterpillar and other qualifying businesses for personal property located within the state. Under this Michigan economic program, even if the business applying for the tax deduction was headquartered in another state, the company's personal property located in Michigan triggered the benefit. *Id.* at 186.

The Michigan Supreme Court considered, with detailed care, the precedents of this court, explaining that the Michigan tax incentive program at issue was proper in its promotion of intrastate commerce, while at the same time, not being a discriminatory burden on interstate commerce. *Id.* at 192.

Caterpillar is consistent with this Court's rulings in *Boston Stock Exchange*, and other decisions cited herein. It is entirely consistent with the tax incentive offered by the state of Ohio to Petitioner DaimlerChrysler, and it is consistent with the economic development and tax incentive priorities of Wayne County.

Making Wayne County more business friendly, is not illegal under the Dormant Commerce Clause. Businesses that want to come into Wayne County from other counties or states or countries, for that matter, have the equal right to apply for these tax incentives.

CONCLUSION

The Constitution sets forth, and rests upon, innovative principles original to the American experience such as federalism and a proven balance in political mechanisms through separation of powers. *Roper v. Simmons*, 543 U.S. 551, ___, 125 S. Ct. 1183, 1200 (2005).

Respondents' remedy lies in using those political mechanisms to change the laws that Respondents disagree with. Respondents' remedy does not lie in the courts.

RELIEF REQUESTED

Wayne County respectfully requests that this Court reverse the decision of the Sixth Circuit.

Respectfully submitted,

EDWARD M. THOMAS
MELVIN BUTCH HOLLOWELL

December 5, 2005